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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 178

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

vs.

J. J. WEEKS, STATE TAX COMMISSIONER; J. M. BAILLIE as AUDITOR and L. T. HALVORSON AS TREASURER OF BARNES COUNTY, et al., all of the STATE OF NORTH DAKOTA,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONER.

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175 E. 4th St.,
St. Paul, Minn.

December 9, 1935.

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GREAT NORTHERN RAILWAY COMPANY,

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J. J. WEEKS, STATE TAX COMMISSIONER; J. M. BAILLIE as Auditor and L. T. Halvorson as Treasurer of Barnes County; G. A. Gilbertson as Auditor, W. D. Conway as Treasurer and Bert M. Salisbury as Auditor-elect of Benson County; Ole Colbornson as Auditor, Sam H. Wilson as Treasurer, C. E. Hurst as Auditor-elect and Arlan Stair as Treasurer-elect of Bottineau County; H. F. Magedanz as Auditor, Jerry Donovan as Treasurer and Thomas P. Borgen as Treasurer-elect of Burke County; F. Ford Doherty as Auditor, C. A. Baumgartner as Treasurer and Paul H. Eddy as Treasurer-elect of Cass County; Otto Rasmusson as Auditor and A. A. Wilson as Treasurer of Cavalier County; John A. Dawe as Auditor, H. J. Oberman as Treasurer and Harry Bjornstad as Treasurer-elect of Dickey County; R. H. Lynch as Auditor, O. A. Steffler as Treasurer, Myrtle Skabo as Auditor-elect and Albert T. Heide as Treasurer-elect of Divide County; S. W. Lyman as Auditor, Hugh Peoples as Treasurer and S. K. Haugland as Auditor-elect of Eddy County; J. B. McWethy as Auditor, M. P. Roberts as Treasurer and Alice Cole as Treasurer-elect of Foster County; Martin O. Haugen as Auditor, John Sandbek as Treasurer and Albert Brenna as Treasurer-elect of Grand Forks County; P. A. Melgard as Auditor, R. J. Howden as Treasurer, R. J. Howden as Auditor-elect and H. B. Nelson as Treasurer-elect of Griggs County; E. W. Olson as Auditor

and Oscar R. Fisher as Treasurer of McHenry County; Arne Tollefson as Auditor, Oluf Erickson as Treasurer and O. M. Fritsvold as Treasurer-elect of McKenzie County; F. J. Haines as Auditor, Nels Hofland as Treasurer, M. L. Glarum as Auditor-elect and Sadie Hofland as Treasurer-elect of Mountrail County; Peter Jorgenson as Auditor and J. J. Schindele as Treasurer of Nelson County; Wm. W. Felson as Auditor, J. H. Hannesson as Treasurer and Norval W. Hodgson as Treasurer-elect of Pembina County; O. A. Spillum as Auditor and O. T. Tofsrud as Treasurer of Pierce County; J. O. Peterson as Auditor and F. J. Burckhard as Treasurer of Ramsey County; C. E. Colcord as Auditor, W. C. Budke as Treasurer, W. E. Coutts as Auditor-elect and Einar Johnson as Treasurer-elect of Renville County; George J. Fischer as Auditor, Karl L. Mikkelson as Treasurer and Einar Vohnson as Treasurer-elect of Richland County; Jas. H. Penny as Auditor, Allister McKay as Treasurer and E. M. Anderson as Treasurer-elect of Rolette County; R. W. Safstrom as Auditor and H. O. Webster as Treasurer of Sargent County; G. J. Mustad as Auditor, Florence Carlson as Treasurer and Ella B. Johnson as Treasurer-elect of Steele County; A. T. Mooney as Auditor and John Gang as Treasurer of Towner County; Gerhard D. Olson as Auditor and Thomas P. Strand as Treasurer of Traill County; W. J. LaMarre as Auditor and Benj. A. Gudajtes as Treasurer of Walsh County; A. G. Torgerson as Auditor and Bert A. Balerud as Treasurer of Ward County; Otto G. Krueger as Auditor and Edith Darcy as Treasurer of Wells County; Morten Mortenson as Auditor and Oscar N. Lee as Treasurer of Williams County, all of the State of North Dakota,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONER.

RESPONDENTS' ARGUMENT TO THE EFFECT THAT THERE IS NO SHOWING AS TO WHAT IF ANY METHODS OF COMPUTATION WERE USED BY THE BOARD OF EQUALIZATION.

The defense in this case is based largely on a process of implying to us arguments that we have not made and then of ably refuting them. The respondents set up men of straw of their own manufacture and then very successfully knock them down.

To begin with, respondents vigorously deny the contention that the Board adopted any exact computation to the last odd dollar and cent, or the exact result of any formula, in making its 1932 assessment which was adopted in 1933. Respondents repeatedly assert that there is "not one word of evidence in the record" to support this contention.

This, of course, is a contention that we have never made. We have never contended that the Board adopted the *exact* result of the computations in 1932. What we do contend is that these computations furnished the controlling reasons why the assessment was in the neighborhood of $79,000,000 rather than thirty or fifty or sixty million. We claim that the *approximate amount* of the assessment was largely governed by such computations, and that as a result of the dominating influence of these computations, approximately $30,000,000 of obsolete values and approximately $20,000,000 of out-state values were included in the assessment.

That these computations were given dominating weight is proven by the facts: (1) that the computations were made; (2) that presumably they were not made vacuously or without purpose; (3) the Answer admits that the assessment was in

fact based upon these computations "and other evidence"; (4) it was admittedly impossible to come within forty or fifty million dollars of the amount of the assessment without using these computations or similar ones; (5) no other method which would come within forty or fifty million dollars of the assessment is shown; (6) the respondents' tax expert knew of no such method and after many months of study had been unable to discover any.

The respondents apparently contend that the assessment is not tinged with any unlawfulness unless it is in the exact amount of an unlawful computation, and that it is immunized against attack if the amount of the unlawful computation is changed by a tenth of a per cent. before entering it upon the assessment rolls. Our contention is that the assessment is unlawful if it is substantially affected by unlawful computations; that we are not required to explain how the exact amount was arrived at; that it is sufficient if we satisfy the court by convincing evidence that several million dollars worth of out-state values or of obsolete values are included in the assessment. If we are wrong in this, then this part of our case must fail and we must rely entirely upon the fact that the assessment is approximately treble the actual current commercial value of the property and that the respondents admit that it cannot be justified by any computation that they know of.

What the record actually shows is summarized in paragraph G of the Answer which admits in *haec verba* that system values *were* determined from five years' earnings and stock and bond prices; that the system value so determined *was* apportioned to North Dakota upon the mileage ratios, not once, but three times, with three different variations; and "that *upon this evidence* * * * the Board did in the year 1932 fix the valuation of plaintiff's property in North Dakota at $78,850,024."

The row of stars in the last quoted sentence indicates the omission of the words "and upon all other evidence and matters of common knowledge before it". We have first omitted these words from the quotation in the last paragraph, and then set them forth here, because it is upon the insertion of these words that the entire argument of the respondents is based. This paragraph G of the Answer appears on pages 26 and 27 of the record and is quoted in full on page 18 of petitioner's original brief.

It is because the 1932 assessment differed by approximately 1/10 of 1% from the average of the three computations set forth in paragraph G of the Answer, and because the Answer, in addition to admitting that these computations were made, and that the assessment was based upon them, also asserts that it was based upon other evidence and common knowledge as well, that respondents make this repeated assertion that the record is barren of even the slightest indication that the Board made any use whatever of any earnings or stock and bond prices for any five year period or any other period or that it made any use of any mileage prorates or any other prorates, or that it used any method whatever.

We have discussed this contention quite fully under Point A2 on pages 17 to 24 of petitioner's original brief.

In addition to contending that there is nothing in the record to indicate that any use was made of earnings or stock and bond prices for the five years ending in 1931, or of mileage prorates, the respondents attempt to show that even if these methods were used, it was proper to use them. The following is a brief synopsis of these arguments of the respondents and of our replies to them.

RESPONDENTS' ARGUMENTS TO THE EFFECT THAT THE BOARD WAS JUSTIFIED IN IGNORING ALL STOCK AND BOND SALES AND ALL EARNINGS MADE IN THE YEAR OF THE ASSESSMENT OR IN THE PRECEDING YEAR AND IN BASING THE ASSESSMENT UPON SALES AND EARNINGS OF THE BOOM PERIOD.

Here again the respondents very ably refute two arguments which they impute to us but which we have never made and which we would be foolish to make. The contentions wrongly imputed to us which respondents so ably refute are: (1) a general contention that the Board is required by law to base its assessment upon some sound mathematical computation or formula; and (2) the particular contention that in 1933 any assessment would be unlawful unless computed solely from 1932 earnings and stock and bond sales and on the cost of service apportionment illustrated in Mr. Turnburke's Exhibit 12.

Of course, we do not make either contention. We agree that the Board is not required to capitalize the earnings of 1932 or of any other period, nor to make its assessment conform to 1932 stock and bond prices, nor to any particular computation or formula. We simply claim that it is irrational and arbitrary to ignore current conditions and current values entirely during a period when a great shrinkage in values has taken place. We claim that in adopting for 1933, the 1932 assessment, based on data ending in 1931, the Board necessarily ignored everything that had happened in 1932 and 1933, thereby ignoring the fact that the worst year of the depression had occurred since the 1931 figures were completed; that our earnings had

shrunk 95%; and that stock and bond prices had shrunk 50%. We contend that the 1932 assessment had been largely governed by the average earnings of $25,000,000 a year for the five years ending in 1931, and that the Board should not have adopted the same assessment when, for nearly four years ending in 1933, our earnings had fallen to $12,000,000 a year, and to $1,290,000 in 1932. We contend that the 1932 assessment was largely governed by stock and bond prices of nearly $600,000,000, and that it should not have been adopted without change in 1933, when stock and bond prices had fallen to less than $300,000,000. We do not contend that this court or any other court would have power to compel the Board to adopt the exact result of any particular computation or formula, and we have never even suggested that the assessment should be reduced to anything like the extent indicated by the shrinkage in our 1932 earnings. Some of the particular arguments advanced by the respondents on this phase of the case are as follows:

(1) It is first argued that stock prices had fallen from an average of 383.17 in September, 1929, to 41.22 in July, 1932; that the prices of the latter date had fallen so low as to be worthless as evidence of value; that these prices were based on fear and panic and not upon investor's judgment; that they were due to the export of gold, the freezing of banking assets, the forced sale of securities and similar emergency conditions; and that the Board was, therefore, justified in totally ignoring all earnings and all stock and bond sales which had been made in 1932 or in 1933. See pages 4, 23, 36, 58, 63 and 64 of Respondents' Brief.

Our reply is first, that the stock prices quoted are from the peak of the boom and the depth of the depression and that the spread between the quoted figures greatly exaggerates the

actual shrinkage which had occurred as reflected by average prices over the years 1932 and 1933. We have never suggested that the Board should have paid any attention to the lowest prices on the lowest day of the depression.

It should also be noted that the great shrinkage which the respondents point out was a shrinkage in equities and not in bonds or in total security prices. A relatively small shrinkage in the actual value of a property may result in a much greater shrinkage in the stock prices. If a property is capitalized with 60% bonds and 40% stock, a shrinkage of only 40% in the value of the property would destroy the equity and wipe out the stock value entirely, but the value of the total securities including the bonds should still be at 60% of its former level. Great Northern stock had fallen to 13½, but the total value of Great Northern stocks and bonds had fallen only from a little over $600,000,000 to slightly under $300,000,000.

We are not contending that the Board of Equalization should have reduced its assessments in proportion to the shrinkage in *stock prices*, either at the lowest date in 1932, or for the year as an average. We have not suggested anything more than that they should *consider* the shrinkage in *total security prices* for the year as an average, which would amount to something like 50%.

The emergency economic conditions mentioned by the defendants might afford some justification to the Board for refusing to be governed entirely by the market prices of 1932 and 1933, even with bond prices included. The Board might have been justified in making its reduction something less than 50% because of these conditions. But surely it was not justitfied in entirely ignoring the sales and earnings of 1932 and 1933, nor in acting as though the boom were still flourishing, and as though there were no depression at all. The 1932 assessment

was only 5% less than that for 1929, and the same amount was adopted as the assessment for 1933, although in the meantime, there had been a 95% shrinkage in earnings and a 50% shrinkage in stock and bond prices. We submit that even though the Board were justified in discounting depression figures, it was not justified in ignoring them, or in assessing our property on the same basis that it would have used if the boom were still continuing and if there had been no depression.

(2) Another argument frequently repeated by the respondents for ignoring the current market prices is that Great Northern stock had paid $92 in dividends over a period of 17 years and $20 in dividends during five years ending in 1930, while the average market price of the stock in 1932 was only $13.20. See page 11 of Respondents' Brief. This fact is relied upon as proving that the investors did not know what they were doing in 1932 and were not using good judgment, and that 1932 stock prices should therefore be given no consideration.

We have pointed out above that a relatively small shrinkage in the total value of a property may wipe out the equity value of the stock entirely. Similarly a relatively small shrinkage in earnings may wipe out stock dividends entirely while still leaving sufficient income for all bond interest. The large dividends of prior years represented a comparatively narrow and always precarious margin above interest requirements, and one that might easily be, and that actually was completely wiped out by a shrinkage in earnings. For the four years ending in 1933, the Great Northern Railway Company failed by many millions of dollars to earn its bond interest. The fact that investors could see small hopes of dividends for some years to come and that they discounted the value of the stock accordingly furnishes no impeachment of their judgment.

And here again we would remind the court that while Great Northern stock had fallen to $13.20 in 1932, the bonds had fallen off very slightly as shown by Exhibit B, which indicates that investors had not entirely lost their judgment or yielded to hysteria, and the total value of both stocks and bonds had fallen off only a little more than 50%. We repeat that even though the Board may have been justified by these unusual economic conditions in discounting the depression shrinkages and in not reducing the assessment to the entire extent called for by the shrinkage in stock and bond prices, it was certainly not justified in ignoring this shrinkage entirely and in continuing to assess the property as though the boom had never ended.

(3) Another argument advanced by the defendants is that it would be a discrimination in favor of railroad property and against all other property if railroad assessments should be reduced in proportion to the shrinkage in earnings and stock and bond prices; that most other properties had lost all of their earning power; that if all assessments were reduced in proportion to the shrinkage in current earnings vast classes of property would have no value and would escape assessment entirely, and the state would not be able to collect enough revenue to enable it to function. (Respondents' Brief, pp. 12, 22, 23, 65.)

In reply to this we would point out that while the evidence shows a shrinkage of 95% in the net earnings of the Great Northern Railway Company and of 50% in its stock and bond prices in 1932, there is no evidence whatever in this record as to the extent, if any, to which values of other properties had fallen, or as to the extent of the shrinkage, if any, in their net earnings. The defendants offered some evidence, over our objection, as to the shrinkage in *gross* income of *farms* but

nothing as to the net income or value of farms and nothing whatever as to any other property. The average assessed value of farm property had been reduced 25% (R. 82), while the assessment of the Great Northern Railway Company was reduced only 5%. There is no evidence whatever in the record to indicate that the reduction made in the assessment of farm property was not entirely adequate to conform to the change in its actual value. The presumption is that the tax officers were obeying the law and assessing farm property and all other property at its actual current money value. If other classes of property were deliberately assessed in excess of their actual current money value, their owners had the same remedy that we have.

And after all, this is another case of answering a contention that we do not make. Respondents point out that it would not be practicable to reduce the assessment on other property in proportion to the depression shrinkage in earnings and they, therefore, argue that railroad assessments should not be reduced in proportion to the shrinkage in depression railroad earnings. We have never claimed any such thing. Our earnings had shrunk 95%. We are not asking for a 95% cut in our assessment. We are simply protesting that the loss in earnings and loss in value was entitled to *some* recognition and that it was arbitrary and irrational to ignore it *entirely* in the case of railroad assessments. Reduced values in the case of farm property were recognized by a 25% reduction in assessment, and we submit that the shrinkage in the value of our property was entitled to at least that much recognition, even assuming that uniformity with other property precluded any more.

(4) The respondents further argue (Brief p. 35) that a consistent use of five year figures over a long period of time will average out in the end and produce the same net result

as though the assessment for each year were based upon the figures for that year only.

The respondents' tax expert, who advanced this argument in his testimony, admitted that its validity, if it has any, would depend upon the *continued and constant* use of figures for the five year period *immediately preceding the assessment*, in periods of falling prices as well as in periods of rising prices (R. 191). In making its 1933 assessment, the Board of Equalization failed to make the usual computation and refused to be governed by the figures for the five years immediately preceding the assessment. If it had done so, the assessment for 1933 would have been more than $15,000,000 less. Even if we were to grant that the consistent and continuous use of five year figures would justify the practice in a situation such as existed in 1933, this justification would not aid the state here because it departed from the usual practice and based the assessment for 1933 upon five years ending in 1931 instead of five years ending in 1932.

(5) Respondents point out (Brief pp. 33, 64) that we had taken no steps to enjoin the 1932 assessment; that the Board was, therefore, justified in assuming that it was a fair valuation for 1932; and that as the physical property and physical operations still remained intact in 1933, it was justified in assuming that the same value existed in 1933.

This might have been true if the Board had been in ignorance of the profound shrinkage which had occurred after the 1932 assessment was made. But the attention of the Board had been expressly called to the fact that figures which had become available since the 1932 assessment was made showed a decrease of 20% in gross operating revenues, 90% in net railway operating income and 35% in the market value of stocks and bonds (R. 297). The depression was a year older in 1933.

The boom period was a year farther behind. Depression conditions had become much worse and the shrinkage in stock and bond prices and earnings had become much greater. We submit that it was not the rational act of a reasonable body of men to blind their eyes to these facts and to totally ignore them, or to assume that an assessment based on 1927-1931 figures, would still be fair and reasonable in the light of 1932 and 1933 experience.

(6) Finally, respondents argue, on pages 58 and 59 of their brief, that every step in the computation of railroad value requires arbitrary assumptions; that the whole process is necessarily an arbitrary one; that the Board's discretion is necessarily absolute as to which arbitrary assumptions shall be made, and that, therefore, all restrictions of reason and logic are off, and that it is entirely competent for the Board to arbitrarily ignore the current value of the property and to levy its assessment against values of a prior period which are no longer in existence.

A clear statement of this argument condemns it. No matter how difficult the determination of value may be, and no matter how many assumptions must be made arbitrarily, it does not follow that the Board can properly ignore current values or current conditions and base its assessment upon bygone conditions which it knows to be obsolete, or assess values which no longer exist.

We believe the above to be a fair summary of the arguments advanced by the defendants for ignoring all stock and bond sales and all earnings made in 1932 or 1933 and for basing the valuation upon earnings and stock and bond prices of the boom period. We submit that none of them are entitled to serious consideration.

We desire next to note the Respondents' replies to our argument in regard to the mileage ratios of apportionment.

RESPONDENTS' ARGUMENTS UPON THE QUESTION OF CREDITING $20,000,000 WORTH OF TERMINAL VALUES TO NORTH DAKOTA.

(1) Upon this subject, Respondents first attack Exhibit 12, presented by Mr. Turnburke, which prorated interstate revenue in proportion to cost of service, and which showed that North Dakota produced only about 12% of our system net earnings and therefore contained only 1/12 of the system value. This is attacked upon the ground that it had not been submitted to the Board before the 1933 assessment was made; that it was a new and untried method; that it had never been used in tax cases; and that Mr. Turnburke had never appeared in tax cases and was not a tax expert. (Respondents' Brief pp. 4, 48, 52.)

This suggested method of apportioning system value is not a necessary part of our case. Perhaps it should not have been offered at all. The burden is not upon us to show the state how the assessment should be determined, nor is the state obligated to adopt the very best or most scientific method that there is. Its only obligation in this regard is to avoid taxing outside property. We have shown conclusively that the method followed by the state necessarily assesses $20,000,000 worth of outside property. Whether Mr. Turnburke's method is the best method that could be adopted for avoiding this or whether it has any merit at all; whether it is any better than the method used by the state; whether Mr. Turnburke is a tax expert; whether the method has ever been used before, are all questions which have so little bearing upon the real issue in this case that we will not take time to offer any further defense of this method of apportionment. We believe it to be more

accurate than any other method referred to in this record, but if this is not so that fact is wholly immaterial.

And, of course, since the failure of the Board to use this method is no part of our complaint against the assessment, the fact that we did not present it to the Board before they made their assessment is equally immaterial. The fact that we did not show them a method by which they could avoid assessing property outside the state, in no way justifies them in levying a $20,000,000 assessment against such property.

(2) The Respondents argue (Brief p. 61) that some or all of the five ratios used in North Dakota have been used for many years and in many states and have never been disapproved.

If for many years North Dakota had been assessing a tract of land close to her boundary line, on the mistaken assumption that it was located in North Dakota, and a new survey should then show that it was actually located across the line in Montana, the current assessment would, of course, be canceled at once. Neither the fact that North Dakota had assessed it for many years, nor that the owner had failed to discover the error or to make it known to the assessing authorities until after the assessment was made would have any bearing upon the case.

The same principles apply here. This is a case where North Dakota has assessed terminals in Minnesota and Wisconsin, just as truly as though she had described them by name or by metes and bounds on her assessment rolls. That fact is indisputable. It may be an honest mistake, but when the mistake is discovered by us and pointed out to the court, we are entitled to have that portion of the assessment canceled for mistake or for excess of jurisdiction, regardless of how often or how long the mistake has been continued.

(3) It is argued that the railway company itself used mileage prorates in computing valuations which were submitted to the Board of Equalization and is thereby estopped from criticizing their use by the Board; that in any event the Board was not advised as to the location of terminals and other facts now presented, and that the criticisms which we are now making of the mileage prorates were not submitted to the Board (Respondents' Brief, pp. 5, 16, 46, 47, 49).

It is true that petitioner submitted to the Board, three computations of value, varying from $24,000,000 to $64,000,000, in which mileage ratios of apportionment were used. However, in the same statement (R. 299), it was pointed out that North Dakota's physical property ratio was only 14% of the total for the system, which is "less than any figure used in the composite ratios for allocation," and that the use of the physical property ratio "alone or in combination with any or all of the other factors" would reduce petitioner's computations. The location of the terminals was a matter of common knowledge. It was commented upon by this court in *Wallace v. Hines*, 253 U. S. 66. The comparative topography and geography of North Dakota and the mountain states are well known. Every map shows our net-work of branch lines in North Dakota. The Board was specifically advised that only 14% of our fotal plant was located in North Dakota. It had plenty of information to put it upon notice that the mileage prorates necessarily taxed property outside the state.

There is no suggestion that petitioner deliberately withheld any information from the Board. It could have no object in doing so. The only reasonable conclusion is that if petitioner failed to submit to the Board the precise argument which we are making here, it was entirely innocent, and was due to the fact that petitioner itself had not then come to a full realiza-

tion of the tremendous extent to which the properties outside the state were being assessed. We submit that since this fact has now become known and has been pointed out to the court, we are as much entitled to a cancellation of that portion of the assessment which is beyond the jurisdiction of the state, as we would be in a case where a new survey had disclosed that a tract of land assessed in North Dakota was actually located outside the state. This part of the case does not depend upon fraud, either actual or constructive, nor does it depend upon our proving any lack of diligence or intelligence on the part of the Board. It is based upon proof of the *fact* that the assessment includes properties outside the state. This involves an excess of jurisdiction which cannot be waived by the taxpayer.

(4) That mileage ratios are governed entirely by the road miles in a state, and entirely disregard location of terminals; that they *in fact* fail to credit terminal values exclusively to the terminal states; that they necessarily and automatically spread them over the intermediate states; and that they actually credited $20,000,000 of outside values to North Dakota in 1933, is not disputed. In fact this is perfectly self-evident and mathematically demonstrable and cannot well be the basis of an intelligent dispute.

However, on pages 41 to 45 of their brief, respondents point out that the ratios showing miles of haul in North Dakota correspond very closely with the track mile ratio, indicating, according to the respondents, that the average mile of track in North Dakota is worth about the same as the average mile on the system, since it has the same amount of use.

It is true that a mile of road in North Dakota has almost as many tons, cars and engines passing over it in road haul service as an average mile of road outside of terminals on the balance of the system, and that, therefore, North Dakota road

miles may be nearly as valuable from a use standpoint as average road miles outside of terminals in other states. But the fact remains that under these North Dakota ratios, the entire system value, including all terminal values, is wrongfully divided among road miles and none of it is credited to terminals. These ratios indicate that in the division of system value, North Dakota miles are entitled to nearly as much credit as any other road miles outside of terminals; but no road miles are entitled to any part whatever of the terminal values which are included in the system value, and yet the North Dakota ratios credit road miles with all of the terminal values. It is this latter fact which is nowhere disputed by the respondents.

The respondents' argument simply shows that if the system value including terminal values is all to be credited to road miles, the North Dakota formula is a fair way of doing it, so far as the division between road miles is concerned; but it does not begin to justify the giving of any credit whatever to road miles for any part of the terminal values. *If the terminal values* (which for three terminals alone are about as great as those of the entire property in North Dakota), *were first deducted from the system value*, leaving the balance as the value of the system road miles, then it might be proper to apportion this balance in proportion to miles of track or miles of road, or in proportion to the miles of haul factors. The fact that the ton and passenger mile and car and engine mile ratios for North Dakota are about the same as the track mile ratio would seem to justify this.

But neither that fact nor anything else in the record that the defendants have pointed out tends even remotely to indicate that terminal values were in fact deducted, nor to dispute the fact that these ratios entirely fail to credit terminal values

to terminal states, and that on the contrary they do credit them to intermediate states, and in the case of North Dakota to the extent of about $20,000,000 in the 1933 assessment.

There is some slight attempt on pages 41 and 42 of defendants' brief to show that in one year (1932), the average mile of track in North Dakota carried more traffic than the average mile on the system and that North Dakota had a lower ratio of expense to revenue than the balance of the system. This is submitted as an indication that mileage prorates are fair in spite of the fact that they credit terminal values to North Dakota and not exclusively to the terminal states.

The figures quoted by respondents showing volume of traffic, are based upon the number of traffic units per mile of all track and not per mile of road. They are obtained by dividing the number of tons, cars or engines moved out on the road, by the number of miles of all track including switching tracks and double tracks. The figures in the numerator *exclude* switching *movements,* but the figures in the denominator *include switching tracks.* And a ton moved over one mile of road which is double-tracked would be divided by two miles of all track and would be counted as half a ton mile under this method. This is a distorted method of measuring traffic density and one that has no recognition in common use (R. 212). The sound method is to measure ton miles, car miles, etc. per mile of *road* and not per mile of all track. Measured by this recognized method, the density in North Dakota has never been anywhere near the density on the balance of the system (Ex. 14, R. 241).

The statement from Exhibit L on page 42 of respondents' brief, that the ratio of operating expenses to total revenues in North Dakota is less than on the balance of the system, involves a fallacy which has been pointed out to the respondents, and we think that the repetition of this statement in the brief

is hardly fair to us or to the court. In obtaining the ratio of expense to revenue which is quoted, the revenues credited to North Dakota consist, to the extent of 92%, of mileage prorates of the interstate through revenues. By these mileage prorates no part of the revenue is credited to the terminal, nor assigned for payment of terminal expenses, which constitute 1/3 of the total on the average. On the contrary the entire through revenue is assigned to the haul over the road between terminals, and is divided on a mileage prorate. In this way, North Dakota is credited with all of the revenue which is designed to pay for the road haul she performs and also a large share of the revenue which is designed to pay for the terminal services in other states. By thus crediting her with the terminal revenues, and not charging her with any of the terminal expense, the ratio of her own expense to her own revenue plus a part of the terminal revenue is made to appear very low, while the terminal states, which incur the terminal expense but get none of the revenue which is provided to pay for it, necessarily show a high ratio of expense to revenue. Under this method, in a year when the system as a whole is earning 5%, an intermediate state like North Dakota might be credited with earnings of 20% while the important terminal states would show deficits (R. 213). Under these circumstances, we submit that it is hardly fair to the court to submit a computation purporting to show that North Dakota operates more economically than other states, when it actually shows nothing more than that North Dakota is being wrongfully credited with some of the terminal revenues but none of the terminal expenses.

This sort of argument is the only argument that the respondents have presented in defense of the merits of the mileage prorates. It would have been better for them to have remained

silent. The failure to otherwise dispute, or reply to our argument is to our minds a confession of the vices of the apportionment ratios used in North Dakota. It is an admission that they entirely fail to credit the terminal values to the terminal states, and necessarily spread them over the intermediate states, which means that about $20,000,000 of the 1933 assessment was levied against property outside the state, as truly as though the Seattle and Twin City terminals had been specifically listed on the North Dakota assessment rolls.

The case of *Rowley v. C. & N. W. Ry.*, 293 U. S. 102, is cited by the respondents, as supporting the ton mile and car mile ratios. It is argued on page 43 of respondents' brief, that this case at bar is stronger than the Rowley case because there is less spread here than in the Rowley case between the mile haul ratios and the track mile ratio.

It would rather appear to us that where the mile haul ratios are very much lower than the track mile ratio, as they were in the Rowley case, they tend to lower the average ratio, and therefore to reduce the vices of the objectionable track mile ratio and, therefore, to make a better case for the state than is presented in North Dakota, where the mile haul ratios are almost as high and therefore just as objectionable as the track mile ratio.

Be that as it may, however, not even a declaration or finding by this high court could make that a fact which is not a fact, and if the Rowley decision were to be construed as a finding that, under facts like those existing on the Great Northern Railway and in North Dakota, these mileage prorates allocate the terminal values to the terminal states, and do not spread them over the intermediate states, it would be a demonstrable error and one that should be promptly corrected. We would respectfully refer to the discussion of this case on pages 49 and 50 of our original brief.

MISCELLANEOUS ARGUMENTS.

The respondents offer much argument to the effect that the assessment of railroad property is not an exact science nor a matter of formula; that the Board did not in fact follow any formula or use any method; that it would be unlawful to consider current sales or current earnings in making its assessment, because that would be using a formula, and assessments must be made by judgment and not by formula; that in any event the Board is a lay board without any specialized knowledge of tax theory and economics, and should be indulged on this account in not considering current values and in not following any other particular method or formula; and that on these grounds, the fact that the assessment exceeds any rational computation that can be made does not necessarily condemn it.

We have already conceded that the Board was not obliged to compute a value from 1932 earnings. And if the argument just referred to means that it was not obliged to adopt the exact result, to the last dollar and cent, of any particular method of computation, we concede that. It is not even necessary that the best or most scientific method of computation should have been before it. But on the other hand, it would be arbitrary and irrational to make an assessment by grabbing a number out of the air, without any rational process whatever, and without any idea as to whether the number so seized upon might be several hundred per cent. more or less than the actual value of the property. An assessment so arrived at, if grossly excessive, should be set aside.

In this case the respondents are in a dilemna. Either the amount of $78,832,888 was adopted from the 1932 figure, which in turn was determined because the five year figures ending in 1931 and the mileage prorates seemed to justify an amount

approximately as large as that; or else it was arrived at without any rational process whatever. The undisputed evidence shows that it would be impossible to arrive at any figure within many millions of dollars of the assessment without ignoring 1932 and going back to 1927, and without using mileage ratios of apportionment. The state's own tax expert confessed that even by including five years ending in 1932 and by using mileage prorates, he could not come within many millions of dollars of justifying the assessment.

It follows that the Board either levied a large part of its assessment against values of a bygone economic era and values outside its own state boundaries, in which case the assessment was beyond its jurisdiction and void; or else it failed to function rationally, and determined the assessment by pure guess and without the attempted exercise of any intelligent process whatever, in which case the assessment was wholly arbitrary.

On pages 72 and 73, respondents argue that this was at most a "sporadic case" of over-assessment and, therefore, not subject to correction in court.

The doctrine of the "sporadic case" has been applied in cases where the property owner has complained, not that his own property is overvalued, but that other classes of property are undervalued, resulting in discrimination. So far as we can find, this doctrine has been applied only in discrimination cases. It has been held that where the property in issue is not overvalued, but other property is relatively undervalued, this will not entitle the owner to court relief if it is a mere sporadic case, nor unless it is a deliberate and continuous policy. We know of no case where this doctrine has been applied in a case where relief is asked, not on the ground of discrimination through relative underassessment of other property, but on the ground of gross overvaluation of the property in issue. And

certainly it would not apply to a case of assessment of property outside the state or to the assessment of obsolete values known to have disappeared.

On page 73, respondents contend that we have failed to do equity because we have paid upon an assessed value of some $47,000,000 whereas in our brief before the State Board we asked that the assessment be fixed *not in excess* of $60,000,000.

In that brief, we had computed one value of $46,903,462 and another of $24,733,390, all based upon mileage prorates. We had also pointed out that the physical property ratio would reduce all of these amounts, and the figure of $60,000,000 was mentioned as a maximum.

Our tax representative seems to have felt that $60,000,000 was as low an assessment as he was likely to get from the Board, and that it would be useless to ask for less, and better to accept that from the Board than to have to go to court. This offer was not accepted by the Board, and we were forced to go to court for our relief. The fact that we were willing to accept an assessment of $60,000,000 if levied without court contest, does not preclude us, when forced into court, from showing that the actual value was much less than that.

We submit that the question as to the amount of the tender which should be made in order to get into a court of equity is a question that must rest largely in the discretion of the trial court when the tender is first made. The trial court entertained jurisdiction and granted a temporary injunction upon this tender, and until now, no exception has been taken upon the ground that the tender should have been for a larger amount. We submit that if this contention would ever have had any merit, it is too late to raise it now.

In conclusion, we submit that paragraph G of the Answer admits specifically and concretely that the Board deliberately

ignored all earnings, all stock and bond sales and all evidence of value which had come to light during the years 1932 or 1933; that it based its assessment upon boom period earnings of $25,000,000 a year when the actual average earnings for the four years ending in 1933 were less than $12,000,000; that it based its assessment largely upon stock and bond prices of nearly $600,000,000 when the actual price at which the stocks and bonds were being sold in 1932 and 1933 were less than $300,000,000; that it thereby computed a system value of $415,000,000 (Exhibit P), when the actual system value was not over $200,000,000; that it included in said system value, probably $100,000,000 belonging to terminals, shops, tunnels and extraordinary construction in other states; that it credited to North Dakota nearly 19% of the value, not only of the ordinary road miles, but of the terminal properties, tunnels, etc. as well; that it failed entirely to credit the terminal values back to the terminal states, but spread them all over the miles of road; that whereas North Dakota actually contained less than 14% of the physical plant, and produced only about 12% of the service and earnings, it assessed not only the 14% located within its own borders, but an additional 5% of all the property located outside; that for all of these reasons, the assessment was beyond its jurisdiction and void; and that, even without any proof of the use of improper methods, the assessment is condemned by the fact that it is treble the amount of any fair commercial appraisal of current value, and that respondents have not rested upon the presumption of validity

but have attempted to justify the assessment and confessed their inability to do so.

Respectfully submitted,

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